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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DARREN DAVIS,

Defendant and Appellant.

H041690

(Santa Cruz County

Super. Ct. No. F25577)

Darren Davis pleaded no contest to robbery and admitted strike and serious prior felony allegations. As his sentence was being pronounced, defendant interrupted the proceeding, voicing an objection to the imposition of the additional five-year prison term for the serious prior felony allegation. The court noted and overruled the objection, and defendant immediately retorted, “Objection. I want my own attorney, then. I want to file a Marsden hearing.” The court responded, “The Marsden request is denied. The Court is sentencing at this time.” Defendant continued to interrupt the sentencing proceeding, protesting the five-year enhancement.

On appeal, defendant argues that the court erred by failing to provide him the opportunity to state the reasons why he believed his court-appointed attorney should be discharged under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), and that error should be deemed prejudicial per se. We find no error on this record; but even if the court’s refusal to allow defendant to state his concerns were deemed error, we would find it harmless beyond a reasonable doubt. We will affirm the judgment.

I. BACKGROUND

A. CHARGED OFFENSES

Defendant was charged with three counts of robbery (Pen. Code, § 211).¹ The information alleged that defendant had been convicted in 2001 of violating section 136.1, subdivision (b)(1) in Santa Cruz County Superior Court case No. F03471, and that conviction constituted a prior serious and/or violent felony under the Three Strikes law (§ 667, subds. (b)–(i)) and a serious felony prior under section 667, subdivision (a). According to the preliminary hearing transcript, on September 20, 2013, defendant entered a Wells Fargo Bank in Santa Cruz wearing black fingerless gloves, approached a teller and in a demanding manner said, “ ‘I’m robbing the bank. Give me your hundreds and fifties.’ ” The teller complied, and defendant approached two more tellers demanding money. They complied, and defendant, who never displayed a weapon, left the bank with \$6,954. He was arrested a few days later in a nearby mall, after a witness who had seen defendant at the Wells Fargo bank alerted police to his whereabouts.

B. PLEA ENTRY

At a March 2014 trial readiness conference, the court indicated a seven year sentence, undercutting the prosecutor’s offer by two years, and it kept the offer open until that afternoon, when the case would be assigned for trial. That afternoon the court explained that its seven-year indicated sentence was based on the lower term of two years on count 1 plus five years for the serious felony prior. The court would dismiss the strike prior, and the prosecutor confirmed that he would dismiss counts 2 and 3 conditioned on defendant’s plea. Defendant presented the court with a signed plea form, and he responded affirmatively when the court asked him if the initials and signature on the form were his, and whether he had reviewed the form carefully with his attorney. The court asked defendant if he had any questions about the form, his rights, or the case, and

¹ Statutory references are to the Penal Code.

defendant stated that he had a problem with the “five years for a strike.” Defendant felt he had been overcharged because he had already served time for the prior offense.

The court explained that it lacked authority to dismiss the five-year enhancement. Defendant pressed that the bank robbery was not serious enough to impose the “whole five.” Defendant asked the prosecutor directly if he “can take off the five and just give me, like, the middle of the seven, like four.” The prosecutor said no and defendant countered with five. The prosecutor responded: “I can appreciate your situation. Our offer is nine years. That’s the low term doubled plus five years. That’s the statutory minimum. But [the judge] is going to strike the strike and give you seven. That’s the best it’s going to be.” Defendant again requested five years and the prosecutor said no. Defendant persisted: “Under the circumstances, the nature of the crime, how it was committed and under the influence, and I’ve had a hard time with meth and alcohol and was basically trying to get better but it was a bad call. I wasn’t clear headed. I didn’t do it with --” The prosecutor rejoined: “Sir, I can appreciate all that but this is our disposition. It’s not going to change.” The court asked defendant if he still wished to go forward and defendant said “[y]eah.” The court accepted defendant’s plea and admissions, and dismissed counts 2 and 3 on the prosecutor’s motion.

C. MOTION TO WITHDRAW PLEA

Sentencing was delayed six months because defendant requested new appointed counsel. According to the court’s minute order, a *Marsden* motion was granted, and the alternate public defender was appointed to represent defendant. New counsel filed a motion to withdraw defendant’s plea based on the public defender’s failure to properly investigate defendant’s prior offense and explain the consequences of that conviction.² Defendant supported that motion with a letter from the public defender’s office manager to new counsel stating that the public defender’s file on defendant’s prior conviction

² New counsel also filed motions to disqualify the trial judge under Code of Civil Procedure sections 170.6 and 170.1. Both motions were denied.

(F03471) could not be located. The prosecutor's opposition referenced the colloquy preceding the entry of defendant's plea, in which the court explained the five-year enhancement to defendant, and defendant stated that he had reviewed the plea form carefully with his attorney and understood the indicated sentence. The prosecutor asked the court to take judicial notice of its own records of defendant's 2001 conviction. He attached a print out from the court's electronic database showing the charges and disposition for F03471, including defendant's guilty plea to witness intimidation, in violation of section 136.1, subdivision (b)(1). The opposition also set forth that witness intimidation under section 136.1 is a serious felony under section 667, subdivision (a), citing section 1192.7, subdivision (c)(37).

Defendant testified that he understood a five-year enhancement would be imposed, but the *Romero*³ process was not explained to him, at which point the court injected that the *Romero* process has no bearing on a prior serious felony enhancement. Defendant stated that he was "okay" with two years for the bank robbery, but he had a problem with the enhancement because it was being brought against him "without even being looked at," and "it would qualify today as a misdemeanor." He complained that the public defender could not find his file, and persisted that a court must look at whether the prior still qualifies as a serious felony.

On cross-examination, the prosecutor asked defendant if he recalled the judge telling him before he entered his plea that he would strike the strike and give him the seven-year minimum. Defendant responded "You're the only one that can strike the strike." He said "my attorney wasn't advising me of all my rights that I had or all my options," and "he wasn't – he didn't fulfill his job." The colloquy continued:

[Prosecutor] "[D]id [the judge] tell you that he would strike the prior strike but he would

³ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) recognizes the trial court's authority to strike a prior conviction brought under the Three Strikes law (§§ 667, subs (b)–(i), 1170.12).

have to impose the five-year-- [¶] [Defendant] [The judge] can't strike it. [¶]

[Prosecutor] Let me finish the question -- strike the prior strike and impose the five-year enhancement because he had no authority to strike the five-year enhancement? [¶]

[Defendant] Do you know who has authority? [¶] [Prosecutor] I do. [¶] [Defendant] The Romero process does. [¶] THE COURT: No, it doesn't. [¶] [Defendant] The magistrate has the authority to dismiss it and look at it. You and I go in front of him as a biased -- unbiased magistrate in a different hearing in a different court with a different judge. [¶] ... [¶] [Prosecutor] Mr. Davis -- [¶] [Defendant] That's the Romero -- [¶]

[Prosecutor] -- do you recall this judge [] advising you of the strike prior, that there was one alleged? [¶] [Defendant] Yeah, from 2001. [¶] [Prosecutor] And you heard [the judge] advise you as to the five-year prior, correct? [¶] [Defendant] He said it was part of it. And, of course, I wasn't advised of my option that it should be looked at in a Romero hearing. [¶] [Prosecutor] On the day of the plea did you talk with [your attorney] about the strike prior? [¶] [Defendant] He explained to me what it was and he said they don't even need the file to go forward with it. He didn't explain anything. He said this is what we can do. We can file for a Romero hearing and take a look at the strike to see if it even qualifies still as a felony, which it won't. Why don't you want to look at it? [¶] [Prosecutor] Okay. He also advised you of the five-year prior, correct? And it's the same prior? [¶] [Defendant] All he had to do is advise me of the Romero hearing process. Want to look at this case? Look at it. [¶] THE COURT: Mr. Davis -- Mr. Davis, a Romero hearing does not apply and cannot be used under 667(a)(1) of the Penal Code to strike -- [¶] [Defendant] It says right here it can. [¶] THE COURT: No, it cannot. It cannot be used to strike a five-year prior. [¶] [Defendant] It seems to dismiss it -- [¶] THE COURT: Only the district attorney can dismiss that allegation. The Court cannot strike it. I am not going -- okay. I'm reaching a point, [counsel], where the Court may consider withdrawing from its indicated sentence. The defendant does not have a right to withdraw his plea and so --"

After counsel urged that the indicated sentence was fair, the court ruled: “I think the merits of this motion are meritless. I think this has been an attempt by Mr. Davis at all costs to forestall the inevitable. There was a lot of time that was spent here. There was a lot of consideration. I’m going to take a few minutes right now and I’m going to deny the motion to withdraw the plea because I don’t find that Mr. Davis has shown by clear and convincing evidence, which is a high probability of truth, that he was not adequately advised by [former counsel]. I was the judge there. I watched the discussions here.”

D. SENTENCING

Following the denial of defendant’s motion to withdraw his plea, the court proceeded to sentence defendant. The court denied probation, and it imposed the two-year lower term on count 1. The court continued, “The Court by law under Penal Code Section[s] 1385 and 667(a)(1) will impose an additional five years prison for the 136.1(b) --” Defendant interrupted, “Objection, Your Honor. This case -- the file has to be looked at.” The court noted and overruled the objection. Defendant persisted, “Objection. I want my own attorney, then. I want to file a Marsden hearing.” The court responded, “The Marsden request is denied. The Court is sentencing at this time.” Defendant continued, “Objection, you need to look at this file. That is my right.” Defendant objected two more times as the court pronounced his custody credits, imposed fines and fees, remanded defendant, and dismissed a misdemeanor shoplifting case. Defendant again asked why he was not getting a *Romero* hearing and was told by the court that a *Romero* hearing does not apply.

Defendant continued, “This whole case has nothing to do with the robbery case. It’s a false imprisonment case that would qualify as a misdemeanor and they gave me four years in prison for it and I did two. And now I have to go back and get five, so you’re giving me nine years for a false imprisonment that was just nothing. There was no -- there was no held hostage. You have to be chained to a chair. I didn’t do nothing like

that. It doesn't even qualify as a felony. It's a misdemeanor if you look at it. It has to be looked at. It has to be brought forward and looked at. The case file is right here. It's empty. They can't even find the case file." The court responded by concluding the hearing.

II. DISCUSSION

Defendant argues that his conviction must be reversed because the trial court denied his request for a *Marsden* hearing, depriving him the opportunity to state the reasons why he believed his second court-appointed attorney should be discharged. He contends that the error is reversible per se under *Marsden* and *People v. Hill* (1983) 148 Cal.App.3d 744 (*Hill*). The Attorney General counters that *Marsden* error is not reversible error per se, but rather reviewed for harmless error under *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). Reviewed under *Chapman*, she argues that any error is harmless beyond a reasonable doubt.

A. STANDARD OF REVIEW

The defendant in *Marsden* had requested new counsel during trial because he felt he was not being adequately or competently represented, and the court denied the motion without allowing the defendant to provide the reasons for his request. (*Marsden, supra*, 2 Cal.3d at pp. 121–122.) The California Supreme Court held that the trial court abused its discretion by denying the motion to substitute appointed counsel without listening to the defendant's reasons for requesting a change of attorneys because "[a] trial judge is unable to intelligently deal with a defendant's request for substitution of attorneys unless he is cognizant of the grounds which prompted the request." (*Id.* at p. 123.) The court observed, " '[w]hen inadequate representation is alleged, the critical factual inquiry ordinarily relates to matters outside the trial record,' " necessitating an explanation by the defendant. (*Id.* at pp. 123–124.) The *Marsden* court concluded that the error was prejudicial under *Chapman*: "Because the defendant might have catalogued acts and events beyond the observations of the trial judge to establish the incompetence of his

counsel, the trial judge's denial of the motion without giving defendant an opportunity to do so denied him a fair trial. We cannot conclude beyond a reasonable doubt that this denial of the effective assistance of counsel did not contribute to the defendant's conviction." (*Id.* at p. 126.)

In *Hill*, the defendant made several pre-trial requests for new appointed counsel or to represent himself at trial. (*Hill, supra*, 148 Cal.App.3d at pp. 749–752.) The *Hill* court concluded that the trial court committed *Marsden* error by failing to adequately inquire into the defendant's complaints, and by relying on off-the-record conversations with attorneys who had represented the defendant earlier in the case. (*Id.* at pp. 754–755.) The court observed that the "[f]ailure to inquire adequately into a defendant's complaints results 'in a silent record making intelligent appellate review of defendant's charges impossible.' " (*Id.* at p. 755.) Thus, according to the *Hill* court, "*Marsden* error is typically treated as prejudicial per se, since the very nature of the error precludes meaningful appellate review of its prejudicial impact." (*Ibid.*)

We agree with the *Hill* court that *Marsden* error, which is reviewed for an abuse of discretion, would be prejudicial per se if the appellate court were unable to determine from a silent record the basis of a defendant's request for substitute counsel. But here, the record is far from silent as to defendant's complaint. As was the trial court, this court is cognizant of the grounds which prompted defendant's demand for a *Marsden* hearing even as the court was pronouncing sentence. Thus, any error in this case must be reviewed for prejudice using the harmless beyond a reasonable doubt standard under *Chapman*.

B. ANALYSIS

We find no abuse of discretion in the trial court's denial of defendant's second *Marsden* demand. It is clear from the record that the focus of defendant's request was his displeasure with the five-year sentencing enhancement for the prior serious felony conviction. That displeasure was apparent from the discussion preceding the court's

acceptance of defendant's no contest plea, where defendant felt the five-year enhancement was unduly harsh and, after the court explained that it lacked any discretion to dismiss the enhancement, defendant tried unsuccessfully to negotiate a lesser sentence directly with the prosecutor.

Even though the prosecutor submitted court records showing defendant's 2001 conviction for witness intimidation, and even though the court again informed defendant at the hearing on his motion to withdraw the plea that the five-year enhancement is mandatory and that *Romero* does not apply to a prior serious felony allegation, defendant was of the intractable view that he was entitled under *Romero* to a hearing before a magistrate. When the court denied the request for a *Marsden* hearing, having just denied defendant's motion to withdraw his plea, it was keenly aware of defendant's fixation on the sentencing enhancement. On those particular facts, it was not an abuse of discretion to proceed with sentencing defendant without halting the hearing to allow defendant another opportunity to reiterate his complaint about the five-year serious felony enhancement. (See *People v. Vera* (2004) 122 Cal.App.4th 970, 981 ["It is not practical to grant a long-winded defendant the right to thus monopolize a busy trial court's calendar."].)

Even if the denial of defendant's *Marsden* request without a hearing were deemed error, we would find the error harmless beyond a reasonable doubt under *Chapman*. As a matter of law, defendant's conviction for witness intimidation under section 136.1, subdivision (b) constituted a serious felony subjecting defendant to a mandatory five-year enhancement under section 667. The trial court repeatedly explained this to defendant. Nothing the second or a third attorney could have done would have changed that. Further, although the public defender may have been unable to locate its file from defendant's 2001 case, there is no reason to believe that the prosecutor lacked the ability to prove that local conviction. Finally, defendant was not prejudiced because he did not lose the opportunity to challenge the denial of the motion to withdraw his plea, or

anything that occurred after his motion was denied, on direct appeal or by a petition for writ of habeas corpus. (*People v. Washington* (1994) 27 Cal.App.4th 940, 944.)

It appears from the record that defendant may have been confused about which of his prior convictions supported the five-year prior serious felony enhancement. At the end of the sentencing hearing, defendant referred to a *false imprisonment* case for which he received four years' imprisonment, served two years, and was now having to serve five years. According to the probation report, defendant received a three-year prison commitment in 2003 for a false imprisonment conviction. Defendant does not raise that possible confusion as a basis for trial court error, and we do not see how any confusion could have prejudiced him. Although defendant may not have appreciated that the *witness intimidation* conviction supported the serious felony prior enhancement, it is clear from this record that defendant could not have received a better outcome even with a further hearing. The witness intimidation conviction supported the prior serious felony enhancement, the prosecutor was unable to dismiss that allegation, and the court sentenced defendant to the minimum prison term provided by law.

III. DISPOSITION

The judgment is affirmed.

Grover, J.

WE CONCUR:

Rushing, P.J.

Elia, J.